

**Defenders of Wildlife
American Bird Conservancy
National Audubon Society**

July 20, 2010

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: WT Docket No. 10-88; RM 11349; FCC 10-53

Dear Secretary Dortch:

Thank you for the opportunity to comment on the proposed rule, 2004 and 2006 Biennial Regulatory Reviews--Streamlining and Other Revisions of the Commission's Rules Governing Construction, Marking and Lighting of Antenna Structures; Amendments To Modernize and Clarify the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structures.

As you know, our organizations are concerned with the lighting of communication towers because of the negative effects lighting can have on night migrating birds. Tower lighting can attract birds and cause them to collide with the towers, with the guy wires or each other. This phenomenon results in the deaths of many millions of birds each year. At the Commission's request, our organizations worked with industry representatives to develop recommendations to the Federal Communications Commission on how the tower registration process, on an interim basis, should address bird collisions. A mutually acceptable process was outlined in an MOU, which was submitted the Commission on May 4, 2010.

Many of the species most affected by collisions with towers are experiencing significant declines in populations. The following is the abstract of a recently completed paper entitled *Biological Significance of Avian Mortality at Communication Towers in North America*.

"Birds migrating to and from North American breeding grounds are attracted to the lights of communication towers and associated infrastructures and are (annually) killed in the millions in collisions with the structures and their guy wires. Tower industry advocates argue that these deaths are not "biologically significant," but incorrectly base this assertion on a comparison with mortality from other sources, without regard for the proportions of each species being killed. Avian mortality at towers is not even across species, and the relative importance to populations depends on the status of the species and their vulnerability. We produce an estimate of avian mortality at communication towers that assigns estimated mortality to

species and to geographic regions so that its biological significance can be evaluated. To do this, we constructed a database of mortality by species at towers from available records and calculated the mean proportion of each species killed at towers within aggregated Bird Conservation Regions. We compiled a database of communication towers and predicted avian mortality by tower with an equation estimating avian mortality as a function of tower height that was corrected for sampling, search efficiency and scavenging. It was derived from studies of guyed towers with steady-burning lights, but was modified to also account for lower mortality at towers without guy wires or steady-burning lights. We compared our estimated bird mortality rates to the estimated North American populations of affected species to assess biological significance. Neotropical migrants suffer the greatest mortality; 95% of birds killed are passerines, mostly warblers (Parulidae, 57%), vireos (Vireonidae, 11%), sparrows (Emberizidae, 7%), and thrushes (Turdidae, 6%). Many U.S.-designated Birds of Conservation Concern suffer mortality equivalent to several percent of their estimated total population size, including Bay-breasted Warbler, Swainson's Warbler, Harris's Sparrow, Black-throated Blue Warbler, Golden-winged Warbler, Yellow-throated Warbler, and Kentucky Warbler. Our geographically explicit approach supports the conclusion that tower mortality has a significant biological impact as defined within the U.S. federal regulatory structure. Mitigation measures for these impacts are available, particularly changing the lighting scheme on towers, discouraging the use of guy wires, and careful review of proposed tower locations."¹

While we recognize that the intended purpose of the proceeding is to update and modernize the part 17 rules, to improve compliance with the rules, to allow the commission to enforce them more effectively, and to better ensure the safety of pilots and aircraft passengers and we support these goals, we urge the Commission to consider how this process and the proposed changes relate to the bird collision issue and to use the updating of this rule as an opportunity to address what is undoubtedly one of the Commission's major environmental issues. Commission action in this area is long overdue. In *American Bird Conservancy v. Federal Communications Commission*, 516 F. 3d 1027 (D. C. Cir. 2008), in which ABC challenged the approval of towers in the Gulf Coast region, the court of appeals ruled that the Commission violated NEPA in approving those towers. Although the court believed in 2008 that the Commission should be able to proceed with dispatch on remand, *Id.* at 1035, we are still waiting for the Commission's response on remand.

General Observations on Proposed Rules

We applaud the Commission for seeking to clarify and update its rules governing construction, marking and lighting of antenna structures, and we particularly commend the Commission on including rule language in the proposal, so that members of the public can focus and comment

¹ Biological Significance of Avian Mortality at Communication Towers in North America, Travis Longcore et al. Submitted to Ecological Monographs. Presented at the Joint meeting of Cooper Ornithological Society, American Ornithologists' Union, and Society of Canadian Ornithologists.
http://www.aou.org/meetings/abstracts/AOU_Meeting_Abstracts_128_2010.pdf

meaningfully on the changes. We are hopeful that the Commission will continue this approach in future rulemakings.

Comments Regarding Provisions Governing Specification of Marking and Lighting

Like the Commission, we agree that the rules should not reference obsolete editions of the FAA's Advisory Circulars. However, we do not support for the Commission's proposal to delete any reference to the Advisory Circulars. Rather, the reference should be to currently operative FAA Advisory Circulars or other relevant FAA policy documents. The FAA recently completed a conspicuity study to determine whether L810 lights can be extinguished or modified on towers without negatively affecting aircraft navigation safety. This study was conducted because steady burning L810s are the most problematic lighting scheme for birds. If the FAA determines that L810s can be extinguished or modified, either on existing towers and/or on new towers, we are uncertain how the FAA will formalize its finding and modify the circular or any other FAA document(s). We want the Commission to specifically reference the proper FAA document(s) that discuss this issue so that tower registrants are fully aware of the FAA's decision.

Related to this issue, the notice states "PCIA proposes that the Commission specify in the rules that lighting and marking requirements do not change unless the FAA recommends new specifications for particular structures. PCIA believes this language is necessary to clarify that a revised FAA Circular does not impose new obligations upon already-approved antenna structures."

The Commission also sought comment on whether, in the event the FAA changes its standards, it may instead be preferable for the Commission to have the flexibility to apply any new standards retroactively. The Commission asked if it should defer in the first instance to the FAA as the expert agency on aircraft navigation safety as to whether revised standards should be applied to existing structures, unless otherwise specified by the Commission.

We disagree with PCIA that the Commission should specify in the rules that lighting and marking requirements do not change unless the FAA recommends new specifications. Our main opposition to such a specification is that it is unlikely the FAA will recommend extinguishing L810s. It is more likely that it will simply allow the lights to be removed or modified. Given the significant negative impact of these lights to birds we want a proactive approach by the Commission, the FAA and tower owners and licensees to remove these lights if the FAA allows.

We have encouraged both the FAA and the Commission to apply any new standards based on the conspicuity study retroactively, for the benefit of birds and other wildlife. Should the FAA decide the L810s can be extinguished or modified without compromising aircraft navigation safety, there would be no meritorious business or wildlife conservation reasons not to apply any new standards to as many towers as possible. The FAA should allow that modification, and the Commission should apply the standards retroactively.

The proposal goes on to state: "7. Consistent with this discussion, the Commission proposes several specific changes to the rules. Section 17.4 of the rules contains an overview of the antenna structure registration process. The Commission proposes adding to Sec. 17.4 a provision clarifying that the FAA's recommended specifications are generally mandatory, but that the Commission may specify additional or different requirements. The Commission believes stating this simply up front will provide clarity regarding the central obligation of structure owners."

We support the adding of a provision to Sec. 17.4 that clarifies that the FAA's recommended specifications are generally mandatory but that the Commission may specify additional or different requirements as this would allow the Commission to ensure that if the FAA ultimately decides to only allow or recommend, as opposed to require, the extinguishing of L810s that it could require owners to alter L810 lighting systems on their towers.

The proposal also states "The Commission also proposes to amend Sec. 17.4 to indicate that no changes may be made to the lighting or marking specifications on an antenna structure registration without prior FAA and Commission approval. The Commission seeks comment on these proposals."

Here our concern is that if the FAA allows L810s to be extinguished or changed to flashing lights that every tower with this type of lighting system will have to seek both FAA and FCC approval. This would be burdensome to the towers owners, the FAA and the FCC. We urge the commission to develop the rule so that it takes into account the possible results of the conspicuity study and develop a streamlined process that allows towers equipped with L810s to be retrofitted in an expedited manner in order to protect migratory birds.

Comments Regarding Other Matters

Definition of Antenna Structure Owner

The proposal states "The Commission has previously made clear that registration responsibilities fall squarely on the antenna structure owners, and not on the licensees or permittees that are merely tenants of the structures. Nonetheless, the Commission agrees that incorporating a more precise definition into its rules would promote clarity for all parties." The Commission proposes amending Sec. 17.2(c) to provide that the antenna structure owner is the owner of the underlying structure that supports or is intended to support antennas and other appurtenances." The Commission sought comment on this proposal, including any unintended consequences that may result from this change.

For years, the conservation groups have been meeting with industry representatives because industry considered themselves the affected party when it came to addressing the effects of communication towers on birds. We have never met with the owners of the towers and were told that they played little role in the process. The industry groups have stated that they would bear the cost and the burden of preparing environmental assessments if they were required, would suffer from any process that lengthened the registration process and that they would pay the costs of making changes to lighting systems. We believe that both the tower owner and the licensed carriers are responsible for marking, lighting and notification responsibilities relating the tower and therefore do not support the Commission amending its rules to clarify that the obligations of antenna structure owners fall only on the owner of the underlying structure.

Comments Regarding Structures Not Requiring Registration

As the Commission notes in the proposal, some antenna structure owners have voluntarily registered their structures with the Commission, even though such registration is not required. There is a potential benefit to having these towers in a database, and any potential for confusion can be addressed, e.g. by adding a question on whether the submission (application) is required or

voluntary. Therefore, we do not support prohibiting the voluntary submittal of applications for such towers or ordering such applications to be withdrawn. However, the data from such towers should be segregated unless the towers comply with the standards applicable to registered towers. They should not be able to obtain a Finding of No Significant Impact unless they comply fully with the requirements of Environmental Assessments and other applicable environmental requirements.

Comments Regarding Facilities on Federal Land

We believe that it is important for federal agencies to coordinate regarding activities and facilities on federal land. While the specific provision in Sec. 17.58 may no longer be appropriate, it should be replaced with provision ensuring necessary coordination and cooperation among federal agencies regarding federal land. Executive Order 13186 (See <http://www.fws.gov/migratorybirds/Partnerships/migbrdeo.pdf>), issued on January 10, 2001 by President Clinton aims to create a more comprehensive strategy for the conservation of migratory birds by the Federal government, thereby fulfilling the government's duty to lead in the protection of this international resource. The Executive Order provides broad guidelines on conservation responsibilities and requires the development of more detailed guidance in Memoranda of Understanding by each federal agency. The Forest Service completed their MOU in 2008. See <http://www.fws.gov/migratorybirds/Partnerships/MOU%20USFSFinal.pdf>. The BLM completed its MOU this past spring. See <http://www.fws.gov/migratorybirds/Partnerships/BLMEO13186MOUSigned%204.12.10.pdf>. While the Forest Service does not specifically mention communication towers in its MOU, the BLM MOU states: "Minimize collisions with fences and meteorological towers on public lands through construction and marking stipulations." Because both these federal agencies collectively oversee millions of acres of lands and because towers may be constructed on these lands, it is important for the rules to ensure notice to federal agencies.

Thank you for the opportunity to comment.

Sincerely,

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